Supreme Court, U. S.
FILED
JUL 17 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-33

THE FIRESTONE TIRE & RUBBER COMPANY,
a corporation,

Petitioner,

vs.

CLIFFORD GRIGGS,

Respondent.

Petition For a Writ of Certiorari To The United States Court of Appeals For The Eighth Circuit

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The Petitioner, The Firestone Tire & Rubber Company, a corporation, (hereinafter "Firestone"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered in this proceeding on April 8, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in Appendix A hereto. No opinion was filed by the District Court judge in denying Firestone's motions for directed verdict, for judgment notwithstanding the verdict, or for new trial; and no opinion was ever filed by the Court of Appeals in denying the petition for rehearing presented to that court.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on April 8, 1975. A timely petition for rehearing was denied on April 29, 1975, and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTION PRESENTED

In construing and ruling upon a flatly erroneous jury instruction, can United States Courts of Appeals be permitted to adopt a rule of construction which assumes that because the instruction is clearly erroneous from a legal standpoint, a lay jury could not have read and followed it literally.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Other than jurisdictional provisions, this petition does not rely upon any constitutional or statutory provisions. To the extent that the rule that erroneous jury instructions are grounds for new trials is now part of Rule 59 of the Federal Rules of Civil Procedure, the following part of Rule 59 (a) is relied upon:

> Rule 59
>
> New Trials; Amendments of Judgments
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts of the United States; ...

STATEMENT OF THE CASE

The case was tried by the United States District Court for the Eastern District of Missouri which had jurisdiction under 28 U.S.C. §1332, because Respondent, Clifford Griggs, was a citizen of the State of Missouri and Petitioner, The Firestone Tire & Rubber Company, a corporation, had its principal place of business in Ohio and was incorporated under Ohio law. The case had originally been filed in the Circuit Court of Mississippi County, Missouri, but was removed to the District Court under 28 U.S.C. §1441 when the only Missouri defendant was dismissed voluntarily by Griggs.

The following facts constitute a severe condensation of the facts which were developed at the trial, but Firestone believes they are a sufficient background for assertion of Firestone's single contention in this petition. References to the record will be numbers representing the pages in Volume 1 of the three-volume Appendix filed in the Eighth Circuit and transmitted to this Court.

Griggs was injured in October, 1969 while attempting to mount a truck tire. (45-49) He was a farm worker and part-time driver of a gravel truck. (44) He was not and had never been a professional tire mechanic. (83)

The reason for the injury was that Griggs had mounted a tire and tube on a rim assembly which consisted of pieces which had, unknown to Griggs, been mismatched by a local tire mechanic by both type and size. (305) Both rim parts had been manufactured by Petitioner, The Firestone Tire & Rubber Company, one in 1945 (before Griggs was born),

the other 12 years later in 1957. Prior to being mismatched by the local tire mechanic the pieces had been lying unused on another farm near East Prairie, Missouri. (304-305) After reassembling the mismatched pieces, Griggs inflated the tire to approximately eighty pounds per square inch. (81) While attempting to mount the inflated tire and rim assembly on the truck axle, the mismatched rim pieces gave way and the contained air pressure was allowed to escape causing the tire and part of the rim to strike Griggs. (72)

The case went to the jury on the issue whether Firestone had been negligent in failing to warn persons who might be expected to service truck tires that they should not use rim parts which were not compatible. The evidence was that Firestone had issued such warnings to all its customers, *i.e.* truck and trailer manufacturers and independent wheel and rim distributors, the latter handling the replacement market, with urgings that these warnings be passed down the line. (170,178) Griggs stated Firestone had never warned him not to mount tires on rim pieces which were not compatible and that he had never received any Firestone literature to that effect. (52,53) There was no such warning stamped on the rim pieces, but the size and type were stamped on the rim pieces. (376) Tire mechanics from the East Prairie, Missouri area testified that they, too, had received no *Firestone* literature containing warnings about using compatible rim pieces; however, they testified that they knew that only compatible rim pieces should be used. (230-246)

The trial court's entire charge to the jury is contained at Appendix B to this petition. The instruction which is the subject of this petition is as follows:

Your verdict *must be* for the plaintiff if you believe:

First, defendant manufactured the rim base and side ring and lock ring, and,

Second, the rim base and side ring and lock ring were susceptible of being mismatched by size and design and were thereby dangerous to persons using them in the manner and for the purpose intended, and,

Third, defendant knew or by using ordinary care could have known of the dangerous condition, and,

Fourth, the plaintiff did not know and by using ordinary care could not have known of the dangerous condition, and,

Fifth, *defendant failed to warn plaintiff of such dangerous condition,* and

Sixth, defendant was thereby negligent, and,

Seventh, while the rim base and side ring and lock ring were being used in the manner and for the purpose intended, plaintiff was damaged as a direct result of such dangerous condition. (468) (emphasis added)

This instruction was objected to at two different times prior to its being read to the jury. The objections were as follows:

First Occasion (421-422):

> Mr. Purcell: The defendant, Your Honor, has objection to make to instruction number—the defendant Firestone objects to the instruction number 2 on the grounds that this instruction by its language of stating that the rim base and side ring and lock ring were susceptible of being mismatched places an unwarranted burden on the defendant and misdirects the jury as to what the law is and directs the jury to believe that they can return a verdict against the defendant Firestone in this case if they find that the rim and lock ring is susceptible of being mismatched and, therefore, amounts to a misdirection to the jury.

Second Occasion (438-439):*

> Mr. Purcell: The Defendant Firestone further objects to the giving of Instruction number 5-B upon the grounds that the instruction when read together with Instruction number 2 constitutes a misdirection to the jury in that it permits the jury to find against the defendants by a misdirection of the law to the effect that it creates a duty not legally imposed upon the Defendant Firestone.
>
> The Court: For the record, I take it that when you say set out in 2 hereof, you're speaking of your verdict director?
>
> Mr. Dement: Yes, sir.
>
> The Court: Well, just use the language "other instructions submitted herewith."
>
> Mr. Gardner: I'm sorry, Judge, that's not supposed to be 2. She mistyped it. It's supposed to be a little a. I think I proof read it.
>
> The Court: That will be "a" then.
>
> Mr. Purcell: And further Instruction 5-B, when read together with Instruction number 2 *places an undue burden of warning* upon the Defendant Firestone and, therefore, directs the jury that they might find against Firestone when Firestone has not breached any duty that they might owe to plaintiff in this case. (emphasis added)

After 41 minutes of deliberation a six-man jury returned a verdict in favor of Griggs and against Firestone in the amount of $250,000.

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* The Eighth Circuit stated Firestone failed to preserve its objection but clearly overlooked this "Second Occasion" (Appendix A, p. 10a).

REASON FOR GRANTING THE WRIT

Firestone is acutely aware that this Court has neither the time nor inclination to grant petitions because the District Court and Court of Appeals made erroneous judgments, particularly in diversity cases.* The reason Firestone believes that this petition should be granted is the unprecedented way in which the Court of Appeals for the Eighth Circuit disposed of a patently erroneous and unambiguous jury instruction. The mischief which will result from this type of judicial reasoning has implications for all matters wherein a trial by jury is guaranteed to civil and criminal litigants in federal courts.

The instruction in question appears in Appendix B hereto and at page 6 of this petition. In literal lay terms it means that if Firestone failed in fact to cause Griggs personally to perceive a warning that he should be careful to use or reassemble only rim pieces which are compatible, the jury "must" find for Griggs. This is a flat misstatement of the law of negligence.** The trial judge obviously did

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* It was Firestone's position both in the District Court and in the Court of Appeals that the facts were so egregious as to compel a directed verdict or judgment notwithstanding the verdict under Missouri law. Firestone will refrain from the temptation to argue again the substantive issues in this petition.

** The duty to warn in a negligence context is not absolute. The defendant is neither a guarantor nor an insurer that the plaintiff will be warned. The defendant must exercise "reasonable care." *Morris* v. *Shell Oil Co.*, 467 S.W.2d 39 (Mo. 1971); Restatement (Second) of Torts §388 (1965). See particularly the Comment on Clause (c) of §388.

not mean that Griggs must receive a warning, and no reasonable lawyer would interpret it that way. However, the jury consisted not of judges nor of lawyers, but of six conscientious lay persons who had sworn that they would follow the trial court's instructions on the law. No one told them not to follow the instructions literally. Realizing that in matters of federal procedure this Court is the final word, nevertheless we commend to this Court the reasoning of two Missouri appellate judges in cases decided many years ago:

> *The test of the correctness of an instruction is determined by ascertaining what an instruction means to the average juryman.* This rule is well stated by Reynolds, J., in *Knapp* v. *Hanley,* 153 Mo. App. 169 loc. cit. 174, 132 S.W. 747, loc. cit. 748, as follows:
>
> "The test of correctness of instructions lies not in the indulgence of that close analysis which the lawyer in the seclusion of his office and with the aid of his books, and the trial or appellate courts, with the benefit of briefs and arguments of learned counsel before them, give to the instructions, but as to *how those instructions will naturally be understood by the average men who compose our juries,* on whose judgment on the facts the courts must act." *Rodenkirch* v. *Nemnich,* 168 S.W.2d 977, 979 (Mo. App. 1943) (emphasis added).

Firestone did not contend Griggs had, in fact, received a warning, but contended throughout the trial that its warning efforts had been reasonable. Yet, the instruction gave the jury no choice because a warning in fact had not been received by Griggs.

The Eighth Circuit in the face of this clearly reversible error held that the instruction was "in some limited sense ambiguous," that Firestone's interpretation of the instructions was "extreme," and concluded by saying

we believe it unlikely that the instruction was so understood by the jury. (Appendix A, p. 10a)

If this method of disregarding a patently erroneous jury instruction is allowed to stand, all meaning will be stripped from Justice Story's characterization of the relationship between judge and jury.

> It is the duty of the court to instruct the jury as to the law;* and it is the duty of the jury to follow the law, as it is laid down by the court. *United States* v. *Battiste,* 24 F. Cas. 1042, 1043, (No. 14,545) (C.C.D. Mass. 1835), quoted at *Herron* v. *Southern Pac. Co.,* 283 U.S. 91, 95 (1931).

The Eighth Circuit's opinion is destructive of this notion, and the federal courts should be put on notice of that fact by this Court.

CONCLUSION

For the foregoing reason, a writ of certiorari should issue to review the judgment and opinion of the Eighth Circuit.

Respectfully submitted,

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* And, of course, the instruction must be an accurate statement of the law. *Davis* v. *Patrick,* 122 U.S. 138, 154 (1887).

APPENDIX A

UNITED STATES COURT OF APPEALS
For The Eighth Circuit
No. 74-1606

CLIFFORD GRIGGS,
Appellee,

vs.

FIRESTONE TIRE AND RUBBER COMPANY,
a corporation,
Appellant.

Appeal from the United States District Court
for the Eastern District of Missouri.

Submitted: February 12, 1975
Filed: April 8, 1975

Before MATTHES, Senior Circuit Judge, HEANEY and WEBSTER, Circuit Judges.

MATTHES, Senior Circuit Judge.

On October 2, 1971, plaintiff Clifford Griggs was injured while attaching to a Ford truck a tire mounted on a Firestone multi-piece rim. As plaintiff was securing the wheel to the truck, the tire and rim assembly exploded, resulting in serious and permanent injuries to his face and head. Griggs filed suit against the Ford Motor Company and the Firestone Tire and Rubber Company, but on plaintiff's motion the court subsequently dismissed Ford from the case. The cause was tried before a jury and plaintiff was awarded $250,000 in damages. Defendant Firestone, manufacturer of the rim, has appealed from the judgment entered on the verdict.

Appendix A

The case was submitted to the jury on a negligence theory of liability. The principal issues on this appeal are the questions whether the court correctly instructed the jury on the duty owed by Firestone to plaintiff Griggs and whether plaintiff's evidence made a submissible case. For the reasons set out below, we resolve these issues in favor of the plaintiff and affirm the judgment of the district court.

I.

Initially, we review the circumstances of the accident and the proceedings in the district court. The rim assembly involved in this case consisted of three components: the rim itself, a side ring, and a lock ring. The rim was identified from metal stamp impressions thereon as being a Firestone type 20 x 7.5 DA 5° manufactured in 1957. The side ring and lock ring were riveted together and were identified from impressed metal stamps as being a Firestone type "R" side and lock ring combination generically equivalent to the 20 x 7.33 type R. The side ring was manufactured in 1945. There is no dispute that these components were mismatched and were not intended to form a unit.

The defendant conceded at trial and on appeal that mismatched rim components are capable of being assembled into a single unit and that such a mismatched assembly is potentially very dangerous.

The mismatch of the rim components in this case occurred in May, 1971, when Herman Fugate, the prior owner of the Ford truck involved in this case, traded the vehicle to Presson Ford Sales in part payment on a new purchase. Before making the transaction, Fugate removed the tires and rims from the truck, and replaced them with extra tires and and mismatched rim components which he had

Appendix A

accumulated. The actual assembling and mounting of the mismatched rims was made by the Drummond Service Station, a local garage.

The rims and tires placed on the Ford truck by Drummond in May remained thereon until Presson sold the truck to plaintiff's employer, Murray Maynard, in September, 1971. Shortly after the purchase one of the tires went flat, and Maynard directed plaintiff, who was employed as a truck and tractor driver, to make the necessary repair. Plaintiff on occasion had fixed flat tires mounted on wheels with split rims, but he had never repaired tires mounted on a three-piece assembly exactly like the one that injured him. In repairing the deflated tire, plaintiff removed it from the rim, examined the tube, and, failing to discover any puncture, replaced the tube into the tire. He then placed the tire on the rim base and replaced the split rim and ring. Plaintiff then inflated the tire to 80 pounds per square inch and mounted the tire and rim assembly on the axle of the truck. While plaintiff was fastening the lug nuts which secured the tire and rim assembly to the truck, the "tire blowed off," and the unit struck plaintiff in the face and head. He sustained a fractured skull, nose, cheekbones, and other facial injuries. The injuries caused him to be subject to epileptic seizures and he also lost partial vision in one eye.

Mr. Maynard collected the components of the rim shortly after the plaintiff was injured and retained them until they were delivered to plaintiff's attorney. The rim, side ring, and lock ring were exhibits in the case and were examined by the jury.

A principal issue at trial concerned the type of warnings which Firestone in fact conveyed and the type of warnings

which would have been practicable for it to convey. Although the evidence was in some respects conflicting, defendant generally showed that it distributed catalogues containing safety information[1] and various other types of safety literature to the immediate distributors of its rims; namely, parts distributors and the manufacturers of vehicles with Firestone rims as original equipment. Plaintiff's evidence suggested that this literature did not trickle down (at least with any great impact) to the various local service stations which dealt in truck rims and repaired truck tires. There was conflicting testimony about whether it would have been practicable and worthwhile to impress a warning directly on the rim components. Plaintiff's witness,

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1 We quote representative portions from one of Firestone's rim catalogues:

Important Rim and Wheel Safety Precautions

NOTICE!

An inflated tire and rim can be very dangerous. Many accidents, some fatal, have resulted from improper handling and operation of truck rims and wheels. . . .

How to Prevent Rim Accidents
During Tire Mounting

• • •

Use properly matched parts only. Rim base and rings must be matched according to manufacturer, size and type. This information is stamped on each Firestone part. . . .

How to Insure Greater Safety and Service by Properly Matching Side and Lock Rings

It is important to recognize that the various types of highway rims produced by their manufacturers all differ to some degree in design. This is particularly true of removable rings and, as a result, side and lock rings of different rim types are not interchangeable. Some may appear to be, but they actually do not fit properly on the rim base. Serious accidents to personnel have resulted from the use of mismatched rings.

• • •

O. J. Hahn, an expert in mechanical engineering, thought that a short warning could appear on the components without creating any significant "stress lines" in the product which would render the rim less durable.[2] Firestone representative Walter D. Benjamin testified by deposition that complete assembly instructions could not be impressed on the rim parts. While admitting that it would be practicable to place a short warning on the pieces, he reasoned that such a warning would not mean anything to the ordinary individual.

At the close of plaintiff's evidence and again at the close of all the evidence, Firestone moved for a directed verdict. These motions were denied. In submitting the case to the jury, the court gave the Missouri Approved Instructions[3]

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2 Q. . . . Dr. Hahn, based upon your examination of this base ring, this Firestone rim here that's been previously identified as Plaintiff's Exhibit No. 7, and based upon your training and experience in the field of mechanical engineering, do you have an opinion as to whether or not the word "warning—do not assemble without proper instructions" could be placed inside that ring or rim and stamped on there without unreasonably weakening that item?

A. I have an opinion, and it could be put in without weakening this assembly.

Q. Could you freely put any other markings inside this rim within reason designating: "Do not use, only with certain parts"?

A. You could put this in. . . .

Q. Dr. Hahn, could you stamp or could it be done to stamp in there: "Use only with 20—2x7.25 ring and rim together"?

A. This could easily be stamped in there. There's sufficient room, there's sufficient stampings already existing in there which do not give sufficient information; that the additional stresses which probably could be placed on this particular assembly by stamping it in there would not be any more than already are placed on this rim.

3 The parties did not object to the fact that Missouri instructions were given and do not dispute the applicability of Missouri substantive law.

for the negligence liability of a manufacturer of dangerous chattels. The jury was instructed that it must find for the plaintiff if:

> First, defendant manufactured the rim base and side ring and lock ring, and,
>
> Second, the rim base and side ring and lock ring were susceptible of being mismatched by size and design and were thereby dangerous to persons using them in the manner and for the purpose intended, and,
>
> Third, defendant knew or by using ordinary care could have known of the dangerous condition, and,
>
> Fourth, the plaintiff did not know and by using ordinary care could not have known of the dangerous condition, and,
>
> Fifth, defendant failed to warn plaintiff of such dangerous condition, and,
>
> Sixth, while the rim base and side ring and lock ring were being used in the manner and for the purpose intended, plaintiff was damaged as a direct result of such dangerous condition.

App. 468.

The court further instructed on Firestone's duty as follows:

> If the jury believes from the evidence that in the exercise of ordinary care the defendant should have foreseen the probability that because of a mismatch of the rim and lock ring about which you have heard evidence, he would be exposed to hazards of injury resulting from such action, then it was the duty of the defendant Firestone Tire and Rubber Company, either to:

> a) Give such probable user adequate warning of the danger arising from the use of mismatched parts, or,
>
> b) In the absence of adequate warning as set out in (a) hereof, to apply such technology as the jury may believe from the evidence was then available to the defendant to so design the rim and lock ring to prevent the mismatch of those parts.

App. 470.

Firestone made only a very narrow objection to these instructions, stating:

> The defendant, Your Honor, has objection to make to instruction number—the defendant Firestone objects to the instruction number 2 on the grounds that this instruction by its language of stating that the rim base and side ring and lock ring were susceptible of being mismatched places an unwarranted burden on the defendant and misdirects the jury as to what the law is and directs the jury to believe that they can return a verdict against the defendant Firestone in this case if they find that the rim and lock ring is susceptible of being mismatched and, therefore, amounts to a misdirection to the jury.

App. 421-422.

The jury found for plaintiff and assessed damages at $250,000. Defendant moved for judgment n.o.v. and, in the alternative, for a new trial. These motions were denied and defendant has perfected this appeal. We proceed to analyze defendant's several assignments of error.

Appendix A

II.

Some articles supplied for commerce are dangerous by their very nature, without regard to any product defect. A manufacturer or supplier of such inherently dangerous chattels is subject to a legal duty to exercise reasonable care in warning those expected to use the product of the danger presented. Liability is imposed where injury resulting from the use of the product is attributable to a breach of this "duty to warn." *See Morris* v. *Shell Oil Co.*, 467 S.W. 2d 39 (Mo. 1971); *Orr* v. *Shell Oil Co.*, 352 Mo. 288, 177 S.W.2d 608 (1944).

This rule of law is more precisely formulated in § 388 of the *Restatement (Second) of Torts*:

> One who supplies directly or through a third person a chattel for another to use is subject to liability to those whom the supplier should expect to use the chattel with the consent of the other or to be endangered by its probable use, for physical harm caused by the use of the chattel in the manner for which and by a person for whose use it is supplied, if the supplier
>
> a) knows or has reason to know that the chattel is or is likely to be dangerous for the use for which it is supplied, and
>
> b) has no reason to believe that those for whose use the chattel is supplied will realize its dangerous condition, and
>
> c) fails to exercise reasonable care to inform them of its dangerous condition or of the facts which make it likely to be dangerous.

Missouri has long associated itself with the Restatement view, and continues to apply § 388 today. *See Morris* v.

Appendix A

Shell Oil Co., supra; Orr v. *Shell Oil Co., supra.* The Missouri Approved Instructions given in this case embody the Restatement principles.

Defendant, by its very warning literature, implicitly acknowledges that its product is "dangerous for the use for which it is supplied" and that those "for whose use the chattel is supplied" would not realize that dangerous condition. *Cf. Morris* v. *Shell Oil Co., supra,* 467 S.W.2d at 42. However, defendant vigorously contests the proposition that it has failed to exercise reasonable care in warning of that danger. Additionally, defendant contends that, even should it have breached its duty to warn, its negligence could not in any event be a legal cause of plaintiff's injuries.

A. *Duty to Warn.*

Defendant's phrasing of the duty issue in its brief is an argumentative statement of 34 typewritten lines containing 285 words. Although this statement is not easily parsed, we understand defendant to be raising two essential points: first, that the duty instruction of the court erroneously informed the jury that defendant had a duty to personally seek out plaintiff and warn him of the danger[4]; and, sec-

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[4] Firestone phrases the issue as follows:

> The Court Nonetheless Instructed The Jury That . . . Defendant Had A Duty To Seek Out Plaintiff On A Farm In East Prairie, Missouri And Individually Warn Him Of The Obvious Consequences Of Mismatching Rim Components In Both Type And Size. Despite The Fact That Defendant Could Not Physically Comply With Any Such Supposed Duty For Reason That It Would Require Defendant To Follow Its Products To Their Respective Graves And Beyond Their Attempted Resurrection From A Junk Pile . . .

ond, that defendant had, by its warning literature, discharged its duty as a matter of law.

With respect to the first contention, defendant presumably makes reference to the fifth element of plaintiff's verdict directing instruction ("Fifth, defendant failed to warn plaintiff of such dangerous condition") and to that part of the duty instruction providing that adequate warning must be given a probable user. Defendant argues that it was thereby placed under an impossible duty to personally seek out everyone who happens to assemble one of its rims and then and there convey a warning of the danger presented.

Although the instructions may be regarded as in some limited sense ambiguous, we find defendant's interpretation of the instruction on the duty imposed to be extreme and we believe it unlikely that the instruction was so understood by the jury. Since the proof at trial was addressed to several means of communicating a warning (*e.g.*, warning literature, a warning impressed on the parts themselves), we do not believe there is any real possibility that the jury understood that a personal warning was required.

In any event, in order to preserve this alleged error on appeal, Firestone was required to bring its objection to the attention of the court. Rule 51, Fed. R. Civ. P. However, as noted earlier, Firestone made only a single, narrow objection to the instructions rendered by the court, and this objection did not bear on the alleged ambiguity now asserted on appeal. Accordingly, we hold that this supposed error has not been preserved for appellate review. *See Otten* v. *Stonewall Insurance Co.*, ... F.2d ..... (8th Cir. 1975);

Manning v. *New York Telephone Co.*, 388 F.2d 910 (2d Cir. 1968); *Lowe* v. *Taylor Steel Products Co.*, 373 F.2d 65 (8th Cir.), *cert. denied*, 389 U.S. 858 (1967).

There is no obstacle, of course, to our review of Firestone's contention that, as a matter of law, it had discharged its duty to warn and that the jury verdict thus cannot stand. Nevertheless, we observe that the review of a trial court's denial of a motion for judgment n.o.v. is severely limited. In *Hanson* v. *Ford Motor Co.*, 278 F.2d 586, 596 (8th Cir. 1960), Judge Blackmun, now Associate Justice of the Supreme Court, stated that in passing upon the motion for judgment the trial court and this court are

> (1) to consider the evidence in the light most favorable to the plaintiffs as the parties prevailing with the jury; (2) to assume that all conflicts in the evidence were resolved by the jury in favor of the plaintiffs; (3) to assume as proved all facts which plaintiffs' evidence tends to prove; (4) to give the plaintiffs the benefit of all favorable inferences which may reasonably be drawn from the facts proved; and (5) to deny the motion if, reviewing the evidence in this light, reasonable men could differ as to the conclusions to be drawn from it.

We note at the outset that whether a manufacturer or supplier has exercised reasonable care in the distribution of an inherently dangerous chattel involves a calculus in which the nature and degree of the danger are significant factors. As noted in the comments to § 388 of the Restatement (Second):

> Since the care which must be taken always increases with the danger involved, it may be reasonable to re-

> quire those who supply through others chattels which if ignorantly used . volve grave risk of serious harm to those who use them • • •, to take precautions to bring the information home to the users of such chattels which it would be unreasonable to demand were the chattels of a less dangerous character.

Restatement (Second) of Torts § 388, comment n at 309 (1965).

The Restatement comments go on to indicate that the danger posed by a chattel may be so great as to make it unreasonable for a supplier to entrust conveyance of a warning to a middleman in the chain of distribution. In such circumstances, the supplier may be required, where "practicable and not unduly burdensome," to make the chattel carry its own warning:

> Thus, while it may be proper to permit a supplier to assume that one through whom he supplies a chattel which is only slightly dangerous will communicate the information given him to those who are to use it, unless he knows that the other is careless, it may be improper to permit him to trust the conveyance of the necessary information of the actual character of a highly dangerous article to a third person of whose character he knows nothing. . . . [I]f the danger involved in the ignorant use of a particular chattel is very great, it may be that the supplier does not exercise reasonable care in entrusting the communication of the necessary information even to a person whom he has good reason to believe to be careful. Many such articles can be made to carry their own message . . . indicating with a substantial sufficiency their dangerous character. Where the danger involved in the ignorant use of their true quality is great and such means of disclosure are practicable and not unduly burdensome, it may well be that the supplier should be required to adopt them.

Restatement (Second) of Torts § 388, comment n at 309-310 (1965).

In the instant case we have no difficulty with the proposition that the jury reasonably could have found that defendant had not met its duty to exercise reasonable care. By any standard the danger inhering in defendant's product must be deemed great: there is an obvious potential for severe injury from wholly unanticipated explosion of a wheel assembly under great pressure in close proximity to the repairman. As Firestone acknowledges in its warning literature, the resulting harm may easily be grievous bodily injury or even death. Given this potential for severe injury, we cannot say as a matter of law that defendant discharged its duty through the informational literature which it supplied to the various parts distributors and automobile manufacturers using its rims.[5] To so hold would be to ignore the fact that the jury was not bound to consider such an informational campaign as necessarily equivalent to the exercise of reasonable care. As noted in the

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[5] As noted earlier, although Firestone seemingly did supply warning literature to these immediate distributors of its rims, the jury could have found that this informational campaign did not adequately "trickle down" to the many local dealers in Firestone products and the area service stations, and that therefore the informational campaign was not an adequate method for warning probable users of the rims.

Restatement reasonable care may dictate that a warning be impressed directly on the article when (as here) the danger is great and such a warning would not be impracticable or unduly burdensome. Plaintiff presented testimony from which the jury could find that such a warning was practicable and, since Firestone already impresses identification information on its rim parts, the jury could obviously find that the impressing of additional warning information was not unduly burdensome. We believe the jury could reasonably have found that ordinary care required that a warning be impressed directly on this dangerous instrumentality.

In closing our discussion of this issue, we observe that the necessity for rim disassembly is not an infrequent occurrence. The record indicates that a rim may last for twenty-six years or more, and that it probably will have to be disassembled at least once a year. In the life of any given rim, therefore, there are numerous occasions when components may be mismatched and a potential "bomb" created. In calculating the warning appropriate to this danger, Firestone *assumed* that most people servicing its rims would realize the dangers presented and possess the requisite aptitude and experience to assemble the rim safely:

> Q. In that vein, Mr. Benjamin [a former Firestone representative], does Firestone assume that the persons who are going to be assembling these rims and using these rims and repairing these rims are going to be aware if there are more than one type of truck rim?
>
> A. Yes.
>
> * * *

> Q. He must have some basic knowledge, must he not, Mr. Benjamin, in order to even be looking for the possibility that they might be mismatched?
>
> A. Yes.

App. 176-177. We cannot say as a matter of law that it was reasonable for Firestone to devise its method of warning according to this assumption regarding rim users. Indeed, in view of the inevitability of rim disassembly and the practical fact that, at least in some cases, repair is bound to be undertaken, as here, by those not familiar with the particular dangers of these multi-piece rims, the jury could find that Firestone's assumption was unreasonable and that it had failed its duty of care. It is a well-established principle of the law of negligence that

> [d]anger consists in the risk of harm, as well as the likelihood of it, and a danger calling for anticipation need not be of more probable occurrence than less. If there is some probability of harm sufficiently serious that ordinary men would take precautions to avoid it, then failure so to do is negligence. . . . The test is not of the balance of probabilities, but of the existence of some probability of sufficient moment to induce action to avoid it on the part of a reasonable mind.

Bean v. *Ross Mfg. Co.*, 344 S.W.2d 18, 25 (Mo. 1961), *quoting Tullgren* v. *Amoskeag Mfg. Co.*, 82 N.H. 268, 276, 133 A. 4, 8 (1926). *See Morris* v. *Shell Oil Co., supra,* 467 S.W.2d at 43.

Defendant seeks to avoid the above doctrine by reference to the Missouri case of *Morris* v. *Shell Oil Co.*, 467 S.W.2d 39 (Mo. 1971). In *Morris* a domestic maid suffered

contact dermatitis on her hands as a result of using "Cycle Sol 63," a petroleum-based solvent, to remove old wax from a bathroom floor. The maid brought suit against Shell Oil, the manufacturer of the solvent, and against the several companies involved in the chain of product distribution. The jury found Shell liable and awarded plaintiff $6,000 damages. The trial court then sustained Shell's post-trial motion for judgment in accordance with its motion for directed verdict. On appeal the Missouri Supreme Court approved the judgment as to Shell, holding that plaintiff failed to prove whether Shell had given any warning to its immediate distributor.[6]

Defendant would have us read *Morris* as holding that in Missouri a manufacturer or supplier of inherently dangerous chattels always discharges its duty when it warns its immediate distributor. Since defendant warned its immediate distributors, it argues that it was entitled to judgment n.o.v. We think this contention must fail. We note first that such a rule would be clearly inconsistent with Missouri's endorsement of § 388 of the Restatement, since that section clearly contemplates a variable duty to warn dependent on the nature and degree of the danger. Moreover, we find *Morris* easily distinguishable. Emphasized in *Morris* were the facts that Shell sold the solvent in *carload lots* to its immediate distributor, Independent, and that it was only after the product was beyond Shell's control that it was packaged for individual consumption:

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6 The court noted, however, that "some evidence" on the warning issue was apparently available, and thus, "in the interest of justice," remanded the cause for a new trial. 467 S.W.2d at 43.

> In cases where the evidence shows that the manufacturer packaged the product in a container received by the consumer, evidence by the consumer that no warning was received on the container may also be evidence that no warning was given. This was not the situation in this case. The product was sold by Shell in carload lots. It was Shell's duty to warn Independent of the dangers involved, with the intention that such warning be given the ultimate consumer. . . . Since there was no evidence that Shell failed to give a warning to Independent, the plaintiff failed to sustain her burden as to Shell.

467 S.W.2d at 42. Because the solvent was shipped in bulk rather than individual units, it was obviously impossible for Shell to affix a warning to the product which would reach the ultimate consumer. To use the terminology of the Restatement, it was not "practicable" for Shell to make the product carry its own warning message. That task could only be accomplished by the distributor who finally packaged the product for ultimate consumption. In such circumstances, the manufacturer is forced to rely on an intermediate party to apply the actual warning: when the supplier or manufacturer has warned the distributor, he has arguably done all he can do, and his actions may be equivalent to reasonable care. This rationale, however, cannot be applied to the rims manufactured by Firestone. When the product leaves Firestone, it is not impracticable that the product be made to carry a warning. Indeed, if the rims themselves are to carry a warning at all, it is only the manufacturer who can actually impress that warning as the product is being cast. For the foregoing reasons, we reject

the view that *Morris* entitles Firestone to judgment as a matter of law.[7]

B. *Causation.*

Defendant contends that it is entitled to judgment n.o.v. because a jury assertedly could not find that any negligence on its part was a proximate cause of plaintiff's injuries or, alternatively, that as a matter of law the mismatch of the rim components at Drummond's Service Station constituted an independent intervening cause absolving defendant of any liability.

With respect to the proximate cause argument, defendant primarily contends that, even had it impressed a warning on the instant rims, the warning would have been obliterated by years of dirt and rust, and thus would not have been conveyed to the plaintiff.

---

7 We reject also Firestone's contention that plaintiff was not among the "probable users" of its product. The jury could properly find that plaintiff, who had repaired truck tires in the past and was employed in a position (truck and tractor driver) where tire repair was not an unexpected task, was among the group of probable users.

Additionally, we reject Firestone's argument that its duty of care must be defined solely in terms of the prevailing standard of care in the rim-manufacturing industry. The cases cited by defendant are not authority for this proposition, and such a rule would be clearly inconsistent with § 388 of the Restatement. The standard is one of reasonable care (which may or may not be equivalent to industry custom), and an industry thus cannot be allowed to set its own standard of care. *See Witt* v. *Chrysler Corp.*, 15 Mich. App. 576, 167 N.W.2d 100 (1969); W. Prosser, Handbook of The Law of Torts § 33 (4th ed. 1971). "What usually is done may be evidence of what ought to be done, but what ought to be done is fixed by a standard of reasonable prudence, whether it usually is complied with or not." *Texas & P. R. Co.* v. *Behymer*, 189 U.S. 468 (1903) (Holmes, J.).

While this argument was, of course, entitled to consideration by the jury, there was evidence from which the jury reasonably could conclude that a warning on these particular rims would have been visible to Griggs.[8] A Firestone analysis indicated that the rim base was in "fair condition" with only light corrosion in certain areas, and the rim parts in this case were still capable of identification through the impressed codes used by Firestone. Additionally, it may have been that the rims were relatively clean, since they had been installed just prior to the trade-in of the vehicle, and the accident occurred only several days after Maynard's purchase. In any event, these rims were viewed by the jury, and it was a jury question whether, given all the circumstances, a warning might have been so printed and situated that it would have been successfully conveyed.

Given the above evidence, it cannot be said that plaintiff failed to create a jury question on the issue of proximate cause. The determination of proximate cause is ordinarily reserved for the jury, and may be shown by circumstantial

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8 Plaintiff admits that warnings impressed directly on rim components generally would become obscured by dirt, oil and rust. However, we do not understand plaintiff to be admitting that these particular rims were so deteriorated and dirty that the jury could not reasonably have found that an appropriately placed and sized warning would have been visible to Griggs.

Moreover, the fact that rims generally become obscured by road grime does not necessarily detract from the reasonableness of requiring that the rims themselves carry a warning. Since the warning would still be conveyed either when the rims are cleaned or when the grime is not yet such as to obliterate the warning, the grave danger possible might still justify such a warning measure.

evidence. *Kinealy* v. *Southwestern Bell Tel. Co.*, 368 S.W. 2d 400, 402 (Mo. 1963); *Curtis* v. *Fruin-Colon Contracting Co.*, 253 S.W.2d 158, 161 (Mo. 1952). Moreover, we add that plaintiff does not fail to make a submissible case merely because it is not demonstrated with certainty that an adequate warning would have prevented plaintiff's injuries. Cases involving an alleged failure to warn typically involve the element of forecasting what another's conduct would have been under supposed circumstances; certainty in such a forecast is not required. *See Haberly* v. *Reardon Co.*, 319 S.W.2d 859, 868-69 (Mo. 1958). *Cf. Bean* v. *Ross Mfg. Co.*, *supra*, 344 S.W.2d at 25 (although based on New York law, *Haberly* applied general principles of tort law).

Defendant also argues that legal causation has not been demonstrated in that the mismatch of rim components constitutes an independent intervening cause of plaintiff's injuries. As the trial court properly instructed, whether an intervening act will constitute an independent intervening cause is a question of foreseeability. *Willey* v. *Fryogas Co.*, 363 Mo. 406, 251 S.W.2d 635 (1952); 1 L. Frumer and M. Friedman, Products Liability § 11.04. Even where the intervening act is the negligence of a third party, the act does not become a superseding cause where "a reasonable man knowing the situation existing when the act of the third person was done would not regard it as highly extraordinary that the third person had so acted." Restatement (Second) of Torts § 447(b). Moreover, "the law does not require precision in foreseeing the exact hazard or consequence" which in fact transpires; it is sufficient "if what occurred was one of the kind of consequences which might

reasonably be foreseen."[9] *Comstock* v. *General Motors Corp.*, 358 Mich. 163, 99 N.W.2d 627, 636 (1959).

In this case the alleged intervening cause—the mismatch of the rim components—was precisely the event against which Firestone warned in its safety literature. It does not matter that the exact manner in which the mismatch occurred was not foreseen. Firestone cannot argue that, as a matter of law, the precise danger which it contemplated was unforeseen. Accordingly, this contention must fail.

III.

We conclude that defendant cannot succeed in its argument that plaintiff failed to make a submissible case. A jury could reasonably have found that Firestone failed to meet its duty of reasonable care, that this failure was a proximate cause of plaintiff's injuries, and that there was no independent intervening cause.

We have examined defendant's other assignments of error and find them, with one exception, to be without merit. The exception involves Firestone's claim that the trial court erred in rejecting evidence on the customs of other rim manufacturers with respect to warning literature. While such evidence is not conclusive, it is relevant in assessing whether defendant exercised reasonable care.

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[9] A Missouri Court of Appeals has noted that
> the outer limits, within which jurors presently are permitted to find foreseeability, are exceedingly broad and flexible in this jurisdiction as in others.

La Plant v. *E.I. DuPont de Nemours and Co.*, 346 S.W.2d 231, 241 (Mo. App. 1961).

Appendix A

See Witt v. *Chrysler Corp.*, 15 Mich. App. 576, 167 N.W.2d 100 (1969); W. Prosser, Handbook of The Law of Torts § 33 (4th ed. 1971). However, even if the trial court committed error on this point, defendant cannot claim any significant prejudice. Indeed, defendant acknowledges in its brief that evidence of its conformance with general industry practice was elicited at several points during the trial. This alleged error thus provides no basis for reversal.

The judgment for plaintiff is affirmed.

A true copy.

Attest:

Clerk, U.S. Court Of Appeals, Eighth Circuit.

APPENDIX B

JURY CHARGE

The Court: In these instructions you are told that your verdict depends on whether or not you believe certain propositions submitted to you. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. The burden is upon plaintiff to cause you to believe the propositions necessary to support his claim against defendant. The burden is upon defendant to prove plaintiff's contributory fault. If the evidence in the case does not cause you to believe a particular proposition submitted or if you are unable to form a belief as to any such proposition, then you cannot return a verdict requiring belief of that proposition.

You have observed that there has been testimony in this case which may be properly designated as "expert testimony"; that is to say, the testimony of a person skilled in some art, trade or science, or who has knowledge and experience in relation to matters which are not within the knowledge of men of common education and experience. You are instructed that such opinion evidence as has been given in this case is competent evidence for your consideration, and in your deliberations you are entitled to give to such evidence such weight and value as you may think it entitled, measured by the same standard as you would weigh the evidence of any other competent witness in the case.

Appendix B

Your verdict must be for the plaintiff if you believe:

First, defendant manufactured the rim base and side ring and lock ring, and,

Second, the rim base and side ring and lock ring were susceptible of being mismatched by size and design and were thereby dangerous to persons using them in the manner and for the purpose intended, and,

Third, defendant knew or by using ordinary care could have known of the dangerous condition, and,

Fourth, the plaintiff did not know and by using ordinary care could not have known of the dangerous condition, and,

Fifth, defendant failed to warn plaintiff of such dangerous condition, and,

Sixth, defendant was thereby negligent, and,

Seventh, while the rim base and side ring and lock ring were being used in the manner and for the purpose intended, plaintiff was damaged as a direct result of such dangerous condition.

Your verdict must be for defendant unless you believe that defendant failed to use ordinary care.

In addition to denying that any negligence of the defendant proximately caused any injury to the plaintiff, the defendant alleges as a defense that contributory negligence on the part of the plaintiff was a proximate cause of any injuries which plaintiff may have sustained.

Contributory negligence is fault on the part of a person injured which, cooperating in some degree with the negligence of another, helps in bringing about the injury.

Appendix B

The burden is on a defendant alleging the defense of contributory negligence to establish, by a preponderance of the evidence in the case, the claim that the plaintiff was at fault and that such fault was a proximate cause of any injuries which plaintiff may have sustained.

Now, the burden on what I have read prior to this time is on the plaintiff. The burden on these other matters, and that will be the next two instructions I read you; that burden is on the defendant to prove the contributory negligence, and I'll read you those charges at this time.

Your verdict must be for defendant whether or not defendant was negligent, if you believe:

First, plaintiff failed to exercise ordinary care to determine whether or not the detachable rim or lock ring was properly matched and fitted before inflating the tire.

Second, plaintiff's conduct submitted in paragraph one was negligent.

Third, such negligence caused or directly contributed to cause any damage the plaintiff may have sustained.

If you find that the matching of incompatible rim parts constituted a new and independent intervening cause which could not be reasonably foreseen by the manufacturer of the rim parts and that it proximately produced and brought about plaintiff's injuries and damages, then your verdict should be for the manufacturer of the rim parts.

Now, getting on with the rest of the charge and matters of definition and things of that nature. If the

Appendix B

jury believes from the evidence that in the exercise of ordinary care the defendant should have foreseen the probability that because of a mismatch of the rim and lock ring about which you have heard evidence, he would be exposed to hazards of injury resulting from such action, then it was the duty of the defendant Firestone Tire and Rubber Company, either to:

(a) Give such probable user adequate warning of the danger arising from the use of mismatched parts, or,

(b) In the absence of adequate warning as set out in (a) hereof, to apply such technology as the jury may believe from the evidence was then available to the defendant to so design the rim and lock ring to prevent the mismatch of those parts.

The term "ordinary care" as used in this instruction means that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances.

Ordinary care is not an absolute term, but a relative one. That is to say, in deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in light of all the surrounding circumstances as shown by the evidence in the case.

In determining whether or not the plaintiff exercised ordinary care, you must take into consideration whether or not defendant sufficiently warned plaintiff in such manner to apprise plaintiff of the severity, gravity and extent of the dangerous propensities of the rim base and side ring and lock ring.

Appendix B

The term "negligence" as used in these instructions means the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances.

A product is in a defective condition unreasonably dangerous to the user when it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary user or consumer who purchases it, with the ordinary knowledge common to the foreseeable class of users as to its characteristics. A product is not defective or unreasonably dangerous merely because it is possible to be injured while using it.

Sometimes a product cannot be made reasonably safe, but it is nevertheless desirable that the product be manufactured and distributed because of its utility. In such cases it is the obligation of the manufacturer to give appropriate warning of any dangerous condition which is likely to be encountered.

The evidence shows that the defendant did not sell the rim base and side ring and lock ring to the plaintiff. These circumstances do not affect the defendant's liability to the plaintiff in any way.

If you decide that the rim in question was misused on the occasion in question then you may consider that fact, together with all the other facts and circumstances in evidence, in determining whether or not the rim in question contained an unreasonably dangerous condition, or whether the condition of the rim was the proximate cause of the accident.

Appendix B

The manufacturer of a product cannot be required to contemplate a misuse by any careless, ignorant or incompetent person into whose hands the product may come. Injury through the medium of such an agency is neither a probable nor natural result of anything done or left undone by the maker.

The manufacturer of a product is not a guarantor that nobody will get hurt if using the product. All that the manufacturer is required to do is to make a product which is free from defective and unreasonably dangerous conditions.

If you find the issues in favor of the plaintiff then you must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained and is reasonably certain to sustain in the future as a direct result of the occurrence mentioned in the evidence.

Supreme Court, U. S.
FILED
JUL 26 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-33

THE FIRESTONE TIRE AND RUBBER COMPANY,
a Corporation,
Petitioner,

vs.

CLIFFORD GRIGGS,
Respondent.

RESPONDENT'S BRIEF

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No. 75-33

THE FIRESTONE TIRE AND RUBBER COMPANY,
a Corporation,
Petitioner,

vs.

CLIFFORD GRIGGS,
Respondent.

RESPONDENT'S BRIEF

The respondent respectfully prays the Supreme Court of the United States to deny the petition of Firestone Tire and Rubber Company for a writ of certiorari and to adjudge to respondent reasonable damages for his delay.

OPINION BELOW

The opinion of the Court of Appeals (Appendix A to Firestone's Petition for Writ of Certiorari) is reported as *Griggs v. Firestone Tire and Rubber Company*, 513 F. 2d 851.

JURISDICTION

Respondent adopts petitioner's statement of the grounds on which the jurisdiction of this Court is invoked.

QUESTIONS PRESENTED FOR REVIEW

Respondent is dissatisfied with petitioner's inaccurate and unfair presentation of the "question presented" and for that reason feels compelled to clarify same as provided by this Court's Rules 24 and 40.

Nowhere in its opinion did the Court of Appeals directly or by implication assume or hold that the instruction criticized in Firestone's petition was "flatly" or "clearly" or in any other manner erroneous, as depicted by Firestone's counsel.

It is submitted that the question presented for review is, simply, did instruction number 2 in this diversity case correctly set forth the substantive law of Missouri regarding a manufacturer's duty to warn the user of its dangerous product, and (hypothetically) assuming it did not, did petitioner preserve this question for appellate review?

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent adopts petitioner's statement.

STATEMENT OF THE CASE

In order to rectify petitioner's inaccuracies and omissions in its Statement of the Case respondent deems it necessary to enlarge and comment thereon. For the convenience of the Court and the parties, respondent will adopt petitioner's method of reference to the record. Reference to appendices (App.) are to Appendix A and Appendix B printed in Firestone's petition.

Respondent was not injured in 1969; he was injured in *1971* (44; App. A, p. 1a). He was a truck driver who hauled as far away as Tennessee, having done so for approximately ten years prior to the rim explosion which ended that occupation (44, 83, 91; App. A, p. 3a). The trucks he drove were equipped with detachable, multi-piece split rims which came apart (44, 66, 70, 71, 72; App. A, p. 3a), and he had had occasions during that period to fix tires mounted on these rims (44, 91). Firestone's undefined reference to a "professional tire mechanic" does not appear at (83 or 305).

The only marking on the rim base was "Firestone 20x7.5 DA-5°" stamped into the metal (327). Stamped into the metal lock ring and side ring were the symbols "20x9-10" (Pl. Exs. 7 & 8; 49, 297, 337). A person attempting to identify and match these parts was held to know that "9-10" stamped on the lock ring really meant, and was the generic equivalent to "7.33" and that that lock ring was to be used on a rim base bearing the symbol "7.33," not "7.5" (128, 129, 338, 339). Firestone's expert testified that he had no way of knowing how a person like respondent would know the difference (341).

The rim base and side ring with lock ring which injured respondent were available for sale before and probably after his injury, although their design had been judged obsolete by Firestone in 1964 (rim base) and 1967 (side ring with lock ring) (191, 384). Rim parts of the design involved herein had never been recalled by Firestone (361).

The distortion of the lock ring which was not present before and which was caused by the explosion was the only thing which made the lock ring and side ring not serviceable afterwards. The rim base was not damaged and was serviceable both before and after the explosion (51, 92, 129).

While in possession of the prior owner, the truck and its rims had accumulated approximately 400,000 miles and had been involved in about three accidents. These rims were taken off and replaced with extra rims which were kept in a storage place. These extra, or replacement rims included the rim base and side ring and lock ring which injured respondent. Their condition was "okay" and all of them appeared to be interchangeable. The prior owner never received any written information from Firestone about the dangers of mismatching the rims together, or about how to identify different rim sizes (302).

Drummond's Service Station, to whom petitioner refers as a "tire mechanic" put the rim parts together, including the mismatched rim assembly which injured respondent (302, 308).

Some Ford trucks use Firestone wheels. The Ford dealer had never in twenty years seen anything from Firestone which would tell an ordinary person about the dangers of its truck wheel rims (312, 313). The dealer could not tell whether or not the rims were mismatched (315). During the five months in which the dealer had the truck, it was driven approximately 100 to 120 miles without incident (310-312).

During his tire changing operation involving the rim parts which injured him respondent put the split rim back on, inflated the assembly and "pecked" on it to test it and made sure it was "seated right." The rim assembly looked like it was "seated good," as it was "joined together." "Everything was connected" (45-50, 81, 82, 92, 93).

The difference in size and design of the rim base and side ring and lock ring which respondent and the "tire mechanic" failed to notice, and which led to respondent's injury, was infinitesimal, as it was about the thickness of a human fingernail. Such a small difference in rim parts is not capable of detection by the human eye (200, 392).

Firestone claimed it warned people who worked on rim parts by furnishing catalogues in freely available, great quantities to its distributors, on whom it relied to pass them on to the users (323, 394, 395, 396). The assistant manager of Firestone's company owned store in the area could not recall having ever seen any of these catalogues (246, 247, 480, 483). The manager of another Firestone store in the area did not recall ever having been furnished the catalogues (242). An area service station owner/operator who sold Firestone truck wheels and rims, had never been furnished with any such material, although he had requested such from a Firestone distributor, a Firestone store and the Firestone area service man (480, 484, 230, 235).

REASONS FOR NOT GRANTING THE WRIT OF CERTIORARI

Respondent unequivocally agrees that instruction number 2 (420, 421, 468; also set out at pages 6 and 24a of Firestone's petition) constitutes Firestone's sole matter of contention herein; consequently, respondent's argument will concern itself only with the propriety of that instruction and the action taken (or, rather, not taken) by Firestone in connection therewith.

Firestone's reasoning is founded on the false premise that although Paragraph Fifth of instruction number 2 was allegedly found by the Court of Appeals to be "flatly" "clearly" and "patently" erroneous, as variously (but incorrectly) characterized by Firestone, the Court wrongly dealt with same by finding that the jury was not misled thereby. In response to this, respondent states: (1) that the Court of Appeals by no manner of interpretation held that the criticized instruction was erroneous, especially as contemplated by 28 U.S.C.A. § 2111; (2) that in any event, the instruction correctly hypothesized the substantive law of Missouri regarding Firestone's duty to warn of its dangerous product; and (3) considering arguendo that said instruction was erroneous, the lower court properly held that by failing to properly and timely object thereto at trial as required by Rule 51, Federal Rules of Civil Procedure, Firestone failed to preserve said alleged error for review. Respondent will deal with these three points in the sequence above presented.

I

Petitioner seeks to raise the lower Court's passing, but not condemning remark regarding the instructions to the status of a finding of error. To refute this one need only examine the Court's language contained at page 10a of Firestone's petition. The court did not state that the criticized instruction was errone-

ous, but rather that although the instructions "*may* be regarded as in some *limited* sense ambiguous" (emphasis added), that Firestone's interpretation thereof (as requiring Firestone to seek out and personally warn respondent) was extreme and that there was no real possibility that the jury understood that a personal warning was required, because the proof at trial was addressed to several other means of communicating a warning, including warning literature and a warning impressed on the rim parts.

II

Nor did instruction number 2 constitute a "flat misstatement of the (Missouri) law of negligence" and thereby misdirect the jury regarding Firestone's duty to warn.

Instruction number 2 (420, 421, 468; pp. 6 and 24a, Firestone's petition), was the respondent's verdict director, as prescribed by the Missouri Approved Jury Instructions (Cited MAI) (420). (As the Court of Appeals noted at footnote 3 of its opinion, the parties did not object to the use of MAI). Rule 51, Fed. R. Civ. P. requires the trial court to instruct the jury on the law applicable to the case. It is so basic as to not require citation that the substantive law applicable in this particular instance (diversity of citizenship) was that of the state of Missouri. In order to preclude endless appellate controversy (such as defendant attempts to stir here) over the propriety of instructions for a given case, the Supreme Court of Missouri in 1962 appointed a committee of practicing attorneys and law professors to study the entire subject of jury instruction and to recommend standardized instructions for the substantive law governing given fact situations. These results, in the form of recommended pattern jury instructions were adopted by Missouri Supreme Court Rule 70.01 on or about January 1, 1965. These pattern instructions contain and submit to the jury the applicable Missouri substantive law. Deviation from an instruc-

tion as contained in MAI is deemed to be prejudicial error. The theory of recovery submitted to the jury herein was defendant's manufacture of a dangerous instrumentality, coupled with its failure to exercise ordinary care to warn of such danger (468). One, and only one such instruction in this connection is permitted by or found in MAI, that being MAI 31.01 which reads precisely as follows:

> "Your verdict must be for plaintiff if you believe:
>
> First, defendant (manufactured) (designed) (sold) (furnished) (repaired) the (here describe the article such as an automobile), and
>
> Second, the (article) had (here describe defect such as a cracked left front wheel) and was thereby dangerous to persons (using it in the manner and for the purpose intended) (in the vicinity of its probable use while it was being used in the manner and for the purpose intended), and
>
> Third, defendant knew or by using ordinary care could have known of the dangerous condition, and
>
> Fourth, the plaintiff did not know and by using ordinary care, could not have known of the dangerous condition, and
>
> Fifth, defendant failed to warn (describe person to whom the article was delivered) of such dangerous condition, and
>
> Sixth, defendant was thereby negligent, and
>
> Seventh, while (the article) was being used in the manner and for the purpose intended, plaintiff was damaged as a direct result of such dangerous condition.

This instruction, which the Supreme Court of Missouri has declared and adopted as containing the substantive law of that state dealing with a manufacturer's duty to warn, was without deviation submitted to the jury (468).

The Missouri cases which enunciate the duty of any manufacturer in any products liability case based upon negligence simply, generally and uniformly hold that a manufacturer who fails to exercise reasonable care in the manufacture of an article which he should recognize as involving an unreasonable risk of bodily harm to those who use it and to those in the vicinity of its use, is subject to liability for harm caused to them by its use. *Wiley v. Fyrogas Co.*, 251 S.W.2d 635; *Winkler v. Macon Gas Co.*, 238 S.W.2d 386; *Orr v. Shell Oil Co.*, 177 S.W.2d 608. The rule has been construed by the Federal Courts to simply mean that a person who undertakes to furnish chattels for the use of others ordinarily assumes the conjunctive duty to furnish proper and safe appliances. *Wichman v. Allis Chalmers Mfg. Co.*, 177 F. Supp. 857, rev'd 220 F. 2d 426, Cert. denied 76 S. Ct. 71, 350 U.S. 835, 100 L. Ed.

The Missouri cases which posit Firestone's duty as a manufacturer of rims further require that it discharge that duty by exercising ordinary care to adequately warn the user, or those reasonably expected to be in his vicinity, of the danger. *Orr v. Shell Oil Co.; Winkler v. Macon Gas Co.*, supra. For instance, in *Wichman*, supra, the manufacturer was judged negligent in failing to warn the user (farm employee) of a hay baler of the dangerous condition thereof. In *Winkler*, the supplier of non-odorized propane gas was held negligent for failing to warn the user of the danger from same. In *Bean v. Ross Mfg. Co.*, 344 S.W.2d 18, the Supreme Court of Missouri held (although it reversed on other grounds) that the manufacturer of a chattel is subject to liability for injury in its use by another when the manufacturer knows or should know that the product's use is or is likely to be dangerous, and when there is no reason to believe that the user will realize it if the manufacturer failed to use reasonable care to warn the user. There, the manufacturer of drain solvent had the duty to adequately warn the user of the danger thereof. In *Spurlock v. Union Finance Co.*, 248 S.W.2d 578, the Missouri

Supreme Court held the supplier of an automobile liable to the user for the supplier's failure to warn the user of the dangers presented by a particular use of the carburetor. (Under § 388, Restatement of Torts, 2d, a manufacturer is considered to be a supplier.) In *Orr v. Shell Oil Co.*, above cited, Shell, the manufacturer, was held liable for failure to warn the plaintiff user of dangerous ingredients in chemicals which Shell furnished him. See also *Haberly v. Reardon Co.*, 319 S.W. 2d 859.

The most recent Missouri decision reaffirming this duty is *Rogers v. Toro Manufacturing Company*, 522 S.W.2d 632, decided approximately four months ago. In holding that the literature disseminated by the manufacturer of a lawn mower which allegedly vibrated into gear and injured the plaintiff did not adequately warn the user thereof, the Court very succinctly stated at page 638 of its opinion:

> "The question very simply put is: Does the instruction or warning adequately advise the user of the defect in the product and the dangers that can be expected from the failure to follow the instructions?"

Section 388 of the Restatement of Torts, which has long been adopted in Missouri (*Orr v. Shell Oil Co.*, and *Winkler v. Macon Gas Co.*, supra, decided in 1943 and 1951 respectively), and after which above mentioned MAI 31.01 was patterned, both synthesizes and construes the above stated duty to warn. After defining a supplier as any person, including a manufacturer, who in any manner furnishes a chattel for another's use, the restators in their comments note that Firestone's claimed practice of giving to third persons through whom the chattel is supplied all the information necessary for its safe use is merely a *means* by which this information is conveyed and is not in all cases sufficient to relieve the supplier from liability. There must be reasonable assurance that the information will reach those whose safety depend on it.

In that regard, the care which must be taken always increases with the danger involved. It may be reasonable to require those who supply through others, chattels which if ignorantly used involve grave risk of serious harm, to take precautions to bring the information home to the user of such chattels which it would be unreasonable to demand were the supplied chattels of a less dangerous character; furthermore, in such case it may be that the supplier does not exercise reasonable care even in entrusting the communication of the necessary information to a person whom the supplier has good reason to believe to be careful, in which event the supplier may reasonably be required to cause the chattel to carry its own warning.

It is therefore submitted that instruction number 2 did, consistent with the above rules and authorities, rightly require Firestone to exercise ordinary care to adequately warn respondent of its dangerous product, by hypothesizing in paragraph Fifth Firestone's failure to warn and by next conjunctively requiring in paragraph Sixth a finding that that conduct was negligent.[1]

Therefore, the instruction did not, as Firestone asserts at page 8 of its petition, direct a verdict merely upon a finding of Firestone's failure to warn, but further required the jury to find that such failure was negligent[1] under the evidence adduced.[2]

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[1] The instructions defined "negligence" as the failure to use that degree of care that an ordinarily careful and prudent person would use under the same or similar circumstances (App. B, p. 26a, 27a).

[2] Although petitioner also complains at page 8 of its petition that instruction number 2 cast Firestone in the role of a guarantor, the instructions explicitly stated to the contrary, viz:

> "The manufacturer of a product is not a guarantor that nobody will get hurt if using the product. All that the manufacturer is required to do is to make a product which is free from defective and unreasonably dangerous conditions." (421, 472, 433; App. B, p. 28a)

III

Hypothetically and momentarily deciding the above two points against respondent, it is nevertheless submitted that this Honorable Court should not grant the writ of certiorari.

As Firestone repeatedly states in its petition, its single contention of error is addressed to that allegedly contained in paragraph Fifth of instruction number 2, which instruction petitioner has set out verbatim along with its alleged objections thereto at pages 6, 7 and 24a of its brief.

Since petitioner is attacking the court's instructions, it must be determined whether or not it has in the first instance preserved this point for review. The rule relating to preservation of alleged error in instructions is Rule 51, Fed. R. Civ. P. which provides in part that:

> "No party may assign as error the giving or failure to give an instruction unless he objects thereto before the jury retires to consider its verdict, stating *distinctly* the matter to which he objects and the *ground* of his objection." (emphasis added).

On its "first occasion" to object (page 6 of its petition), did Firestone *distinctly* state the matter to which it *now* in retrospect objects and the grounds of its objections? Did it distinctly (or in any other manner) state that the warning portion (paragraph Fifth) of respondent's verdict directing instruction (468), was objectional and state its grounds therefor? That petitioner did not do so is obvious when its purported objection is read in its entirety. The only objection was to the use of the word "susceptible" in paragraph Second of instruction number 2, which paragraph makes no reference to Firestone's duty to warn, but rather hypothesizes the finding that the rim parts were dangerous in the first instance. Thus, Firestone's objections to one portion of the instruction at trial (paragraph

Second) was not sufficiently distinct to bring into focus the alleged error which is now untimely alleged to have been contained in another portion (paragraph Fifth) of the instruction. *Palmer v. Hoffman*, 318 U.S. 109; *Wright & Miller*, 9 *Fed. Pract. & Proced.* §2554. In summary, an instruction cannot be objected to on one ground at trial and attacked on a different ground on appeal, nor can error be asserted on appeal with respect to one portion of the instruction when only a different portion thereof was objected to at trial. *Mathes & Devitt, Fed. Jury Pract. & Inst.*, §5.04.

The "second occasion" of Firestone's objection (page 7 of its petition) relates only to instruction number 5-B (420, 438, 470; pp. 25a and 26a, Firestone's petition), which, as petitioner states, is not the subject of its petition to this Court; however, respondent has no reservations against examining same in connection with petitioner's assignment of error.

The objection to instruction number 5-B is limited solely and only to, and sought relief only from that instruction—it sought absolutely no relief from instruction number 2. To illustrate the obviousness of this, it is only necessary to in retrospect, project that would have logically followed had the trial court done precisely what Firestone asked with respect to each instruction.[3] As previously emphasized, Firestone's only objection to instruction number 2 was to the use of the word "susceptible" contained in paragraph Second. Had the court sustained that objection and given Firestone all the relief it then sought with

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[3] A rational corollary to the above-mentioned requirement of Rule 51 is that the party alleging error in an instruction on appeal must first have given the trial court the opportunity, which it refused, to correct any error appearing in the instruction complained of, by at trial stating distinctly the matter to which he objects and the grounds of his objection. In other words procedural Rule 51 very effectively discourages the practice of "sand bagging" which is possible in the few state courts which still allow objections to instructions to be raised for the first time on appeal.

respect to that particular instruction, the only result would have been to change the word "susceptible" in paragraph Second and to do nothing with paragraph Fifth. This would have left paragraph Fifth of instruction number 2 precisely in its present form after having given Firestone all the relief it asked for when it should have asked. Next assume that the court had sustained Firestone's objection with respect to instruction number 5-B and had refused that instruction in its entirety. The overall result after having sustained both of Firestone's "objections" would still have been to include paragraph Fifth of instruction number 2 in its present form, because neither "objection" was addressed to that paragraph at trial.

This, then, is why the Court of Appeals accurately and rightly held that Firestone made only a very narrow and ineffective objection to the instructions (although it was given *three* separate and distinct opportunities to do so, twice before the charge was read to the jury and once thereafter (421-422; 438-439; 473)), for which reason that supposed error was not preserved for appellate review (App. A., p. 10a).

CONCLUSION

It is very respectfully submitted that petitioner has utterly failed to demonstrate any special or important reasons required by Rule 19 why this Court should review the judgment of the Court of Appeals; on the contrary, there appears to be no ground for granting a writ of certiorari, for which reason respondent should be adjudged reasonable damages for his delay, pursuant to Rule 56.

Respectfully submitted

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